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March 7, 2016

Via EMAIL and HAND DELIVERY

Chair Riley Jones and
Honorable Members of the Kings County Planning Commission
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VIA EMAIL and U.S. MAIL

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Re: Agenda Item No. 3: Addendum to Conditional Use Permit No. 10-05 (American Kings Solar, LLC)

Dear Chair Riley Jones, Honorable Members of the Kings County Planning Commission, Mr. Roper:

These comments are submitted on behalf of Kings County Citizens for Responsible Development ("Citizens") regarding Agenda Item No. 3: Addendum to Conditional Use Permit ("CUP") No. 10-05 (American Kings Solar, LLC) ("Project" or "American Kings Project"). Originally approved as the GWF Henrietta Solar Project in 2010 ("Original Project"), the Original Project proposed the construction and operation of a 125 megawatt ("MW") solar photovoltaic ("PV") facility on 957 acres of land located east of 25th Avenue, south of State Route 198, and west of Avenal Cutoff Road in Lemoore, California. The Original Project was proposed by applicant GWF Energy LLC ("Original Applicant") and approved by Kings County ("County") on

December 6, 2010 (CUP 10-05). On January 7, 2013, the County approved a 3-year extension of CUP 10-05. The Original Project was never built.

In February 2015, a new applicant, American Kings Solar, LLC c/o First Solar, ("Applicant"), filed an application with the County to modify the Original Project and extend CUP 10-05 by an additional 3 years. The current Project proposes substantial changes from the Original Project that preclude the County from processing the Project application as a CUP extension and require preparation of a new environmental document, pursuant to the California Environmental Quality Act ("CEQA").[1]

In particular, the Applicant proposes to expand operations by adding an agricultural sheep grazing operation to the previously approved 125MW solar facility; to delete previously approved mitigation measures to set aside a 978-acre agricultural conservation easement and a 498-acre foraging habitat easement for Swainson's hawk; and to reduce the construction period for the Project from 35 months to just 15-18 months. The Applicant also proposes to expand the Project footprint by adding an additional ten (10) acres of land to the Project site.[2] To facilitate these changes, the Project requires modification or removal of ten (10) of the Original Project's twenty-three (23) Conditions of Approval, and eight (8) of the Original Project's mitigation measures. These changes are far beyond a mere CUP extension request, and instead require the Applicant to seek a CUP amendment or an entirely new CUP under to the County's Development Code.

The Project also fails to comply with CEQA in numerous ways. The changes in the Project were not analyzed in the County's original 2010 Initial Study / Mitigated Negative Declaration ("MND"). Nevertheless, the County failed to prepare a new MND or an environmental impact report ("EIR") to analyze the modified Project. Instead, the County seeks to rely on a mere addendum to the MND ("Addendum"). CEQA addendums are authorized only where an applicant proposes "minor technical changes" to a project, and do not provide a public comment period.[3] As discussed herein, the changes proposed by the Project are substantial, and therefore do not qualify as changes that may be analyzed in a CEQA addendum. A new MND or EIR should have been prepared. The deletion of previously approved mitigation measures

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[1] Pub. Resources Code ("PRC") § 21000 *et seq.*
[2] See March 7, 2016 Planning Commission Staff Report re Addendum and Extension of Time for Conditional Use Permit Nos. 10-05 (American Kings) ("Staff Report"), pp. 1-5.
[3] 14 Cal. Code Regs. ("CCR") § 15164(b).

also creates an independent requirement for the County to prepare a new CEQA document with a formal public review period.[4]

Finally, the proposed changes to the Project will result in new and more severe significant impacts to biological resources, traffic, agricultural resources, and air quality that were not analyzed in the original MND. The Addendum also fails to set forth an accurate baseline reflecting existing conditions at the Project site, fails to conduct a threshold analysis of several key components of the modified Project and their potentially significant impacts, and improperly defers the creation of mandatory plans and analysis and mitigation of significant Project impacts to a future time. These omissions render the Addendum deficient as matter of law.

As the result of the County's failure to comply with CEQA, the County is precluded from relying on the Addendum to approve the Project and must instead prepare a revised MND or EIR. The Planning Commission also cannot make the findings required by the County Development Code to approve a CUP extension for the Project at this time.[5] A new or amended CUP is required instead.

We prepared these comments with the assistance of biologist Scott Cashen.[6] Mr. Cashen's comment letter and all attachments thereto are incorporated by reference as if fully set forth herein. Citizens expressly reserves the right to supplement these comments at any subsequent hearings and proceedings for the Project.[7]

I. STATEMENT OF INTEREST

Citizens is an unincorporated association of individuals and labor organizations that are concerned about environmental and public health impacts from industrial development in the region where the association's members and their families live,

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[4] *Katzeff v. California Dept. of Forestry and Fire Protection* (2010)181 Cal.App.4th 601, 614; See Exhibit A, November 9, 2011 letter from Gregory Gatzka, Director of the Kings County Community Development Agency to Riley Jones, GWF Power System Company, re Possible amendment of Conditional Use Permit No. 10-05, p. 1.

[5] Kings County Development Code ("Dev. Code") §§ 1707, 1715.

[6] See March 6, 2016 Letter from Scott Cashen to Christina Caro re Comments on the Addendum for Conditional Use Permit Number 10-05 for the American Kings Solar Project ("Cashen Comments"), attached hereto as Exhibit B.

[7] Cal. Public Resources Code ("PRC") § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* ("*Bakersfield*") (2004) 124 Cal. App. 4th 1184, 1199-1203; *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1117.

work and recreate. The association includes Kings County residents Howard Hite, Brandon Perez, Tikiyie Brooks, Deborah Parrent, Edgardo Orapa and Phonie Orapa, and California Unions for Reliable Energy ("CURE") and its local affiliates, and the affiliates' members and their families, as well as other individuals who live, work and recreate in Kings County. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members of CURE's affiliates may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite.

CURE is a coalition of labor organizations whose members construct, operate, and maintain conventional and renewable energy power plants throughout California. Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. CURE has helped cut smog-forming pollutants in half, reduced toxic emissions, increased the use of recycled water for cooling systems and pushed for groundbreaking pollution control equipment as the standard for all new power plants, all while ensuring new power plants are built with highly trained, professional workers who live and raise families in nearby communities.

In addition, CURE has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. THE PROJECT DOES NOT COMPLY WITH LOCAL LAND USE CONTROLS

A. The Project Does Not Comply with Existing Conditions of Approval

The County Development Code requires the Planning Commission to impose conditions of approval on projects that are "necessary to protect the public health, safety, general welfare, and the environment."[8] Such conditions may include, *inter*

[8] Dev. Code § 1708(A).

alia, restrictions on the time period within which a proposed site may be developed,[9] mitigation measures determined to be necessary to avoid or lessen significant environmental effects that may result from the construction and operation of an approved use,[10] and any other conditions necessary to "make possible the development of the County in an orderly and efficient manner, in conformance with the intent and purposes set forth in the Development Code."[11] Failure to comply with approved conditions of approval will result in revocation of a CUP, unless the CUP is amended or a new CUP application is filed.[12]

1. The Project Requires Removal or Modification of Ten of the Original Conditions of Approval.

The Project proposes substantially different operations and mitigation measures from the Original Project which no longer comply with the existing Conditions of Approval for CUP 10-05. In order to facilitate these changes, the Project requires modification or removal of ten (10) of the Original Project's Conditions of Approval. The proposed modifications are identified in the Staff Report. They include:

> [M]odification of Planning Division Condition Number 1; the deletion of Planning Division Conditions 17, 18, 21, 22, and 23; the modification of Building Division Condition Number 3; the modification of Fire Department Condition Numbers 1, 3, and 7; the addition and modification of Project Design Features; the clarification of the project description and environmental analysis; and the request for a three-year extension of CUP No. 10-05.[13]

Condition No. 1 requires "all proposals of the Applicant" to be adopted as conditions of approval.[14] The Staff Report proposes a sweeping change to Condition No. 1 that would incorporate all proposals of the Applicant "as modified by the CUP Addendum" as new Conditions.[15] As discussed below, the Addendum proposes substantial changes to Project operation, footprint, and the construction timeline. The

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[9] *Id.* at (A)(11).
[10] *Id.* at (A)(13).
[11] *Id.* at (A)(14)
[12] Dev. Code § 1716.
[13] Staff Report, p. 37.
[14] Staff Report, p. 29.
[15] *Id.*

proposed revision to Condition No. 1 would sweep in all of these changes without requiring the CUP to be formally amended.

Conditions Nos. 17 and 18 govern post-Project reclamation of the Project site to return the soil to agricultural use. Condition No. 17 requires preparation of a Soil Reclamation Plan to the County for review prior to the issuance of building permits that originally included a baseline soil analysis and a plan to return the soil to pre-Project conditions within 6 months after expiration of the CUP. As revised, Condition No. 17 extends the 6-month reclamation period to an 18-month period, and adds conditions governing the disposal of Project waste. Decommissioning waste may include hazardous materials such as construction debris, which must be processed at a specially licensed materials recovery facility.[16] The changes proposed to Condition No. 17 effectively create a requirement to defer creation of the decommissioning plan for the Project until after CEQA review has concluded. This type of deferral is prohibited by CEQA, thus rendering revised Condition No. 17 inconsistent with CEQA. These are also substantial changes to the scope of Condition No. 17 that were not analyzed in the MND, and which are not meaningfully addressed in the Addendum.

Conditions Nos. 21, 22, and 23 originally required the Applicant to cancel the existing Farmland Security Zone ("FSZ") contract for the Project site and mitigate the loss of 978 acres of farmland of statewide importance by providing funding to place farmland of equal or greater value into an agricultural conservation easement within the County.[17] The Applicant now proposes to delete these Conditions entirely, and replace them with new Conditions that remove the requirement to cancel the FSZ contract, retain FSZ classification by maintaining a seasonal sheep grazing operation onsite, and eliminate the 978-acre mitigation easement. These are fundamental changes to the Project's design that have not been analyzed in any prior CUP application and are not analyzed in the Addendum.

Building Division Condition No. 3 provides height and design requirements for the Project's perimeter fencing. The Applicant proposes revisions to Condition No. 3 that would reduce the fence height from 8 feet to 6 feet, and would add a foot of barbed wire around the perimeter.[18] No analysis is provided of the impacts that these changes will have on other activities at the Project site, including resulting impacts on dust control and wildlife movement.

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[16] *Id.* at pp. 16 (PDF AG-1), 31.
[17] *Id.* at p. 33.
[18] *Id.* at p. 34.

Fire Department Conditions Nos. 1, 3, and 7 set forth requirements for spacing of solar panel rows, access driveways, and fire training for Project site personnel.[19] Condition No. 1 sets a 400-foot limit on the allowable length of solar panel rows.[20] The Applicant proposes to delete this Condition entirely, and replace it with a requirement that access driveways be provided within the solar array.[21] Although the new Condition appears to address fire vehicle access at the site, it would have the effect of removing a previously approved site layout restriction that may have the unintended result of allowing substantial changes to the design and layout of the solar panels at the Project site. No discussion is provided about the practical implications of the proposed revision to Project design, and the Staff Report does not state whether potential changes to the solar array layout would require a new site plan review.

The Applicant's proposed revisions to the existing Conditions of Approval would create de facto CUP amendments that must be processed as a new CUP application by the County. The Applicant cannot skirt Development Code requirements by portraying the Project as the same project that was originally approved in 2010, when, in fact, it is not the same project. Under the Development Code, changes to conditions of approval and substantial changes to a site plan, such as those proposed here, require an amendment to the CUP or a new CUP entirely. They cannot be processed as an extension.[22] The CUP approval process is designed to afford proposed conditional uses "special consideration so that they may be located properly with respect to their effects on surrounding properties and the environment."[23] By contrast, a CUP extension merely gives the applicant additional time to complete implementation of a project that has been previously considered and approved by the County.[24]

The Staff Report and Addendum acknowledge that the CUP extension is only one of several modifications to the Project that have been proposed by the Applicant.[25] The modifications were not part of the Original Project, and have not been analyzed in any prior CEQA document.[26] The proposed modifications would require substantial

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[19] *Id.* at pp. 35-36.
[20] *Id.*
[21] *Id.* at p. 35.
[22] Staff Report, p. 29, Condition of Approval No. 2 (any expansion of use that is a substantial change from the conceptually approved site plan "will require either an amendment to the approved Conditional Use Permit or a new zoning permit."); Dev. Code § 1701.
[23] Dev. Code § 1701.
[24] *Id.* at § 1715(B), (C).
[25] Staff Report, p. 37
[26] *Id.*

revisions to the existing Conditions of Approval. The modifications therefore require more than a mere extension to the existing CUP. The Project has changed to the extent that a new or amended CUP, and a new CEQA document, are required for the Project.

2. The Project Fails to Comply With Remaining Conditions of Approval.

The Applicant proposes to retain Conditions of Approval Nos. 2 and 3 as currently drafted. Conditions Nos. 2 and 3 set threshold standards for processing CUP amendments and new permits, and mandate that the Project must comply with the County Development Code. Conditions 2 and 3 actually clarify that the Project cannot be processed as a CUP extension, and must instead be processed as a CUP amendment or a new permit. The Project would therefore violate both Conditions if approved in its current form.

Condition No. 2 prohibits expansions of use or substantial deviations from a previously approved site plan unless the CUP is amended. It states:

> No expansion of use, regardless of size, which would increase the projected scale of operations beyond the scope and nature described in this Conditional Use Permit application, will be allowed. ***Any expansion that is a substantial change from the conceptually approved site plan will require either an amendment to the approved Conditional Use Permit or a new zoning permit.***[27]

Here, the Project proposes to expand the Project footprint by 10 acres, expand on-site operations by adding a seasonal sheep grazing operation, and remove the size restriction on rows of solar arrays, thereby implicitly allowing an unlimited number of solar array rows on the site. Implementation of the Project will result in expansions of use that are not authorized under the current CUP. By Condition No. 2's own terms, then, the Project therefore requires either a CUP amendment, a new zoning permit, or both.

Condition No. 3 requires the Project to comply with "all regulations of the Kings County Development Code."[28] As discussed below, the Project fails to ensure

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[27] *Id.* at p. 29, Condition No. 2 (emphasis added).
[28] *Id.*; Condition No. 3.

compliance with the Development Code because it proposes to allow the development of a solar site on agricultural land designated as "Medium Priority" without requiring compensatory mitigation and without substantial evidence that the Project's proposed sheep grazing operation will be comparable to existing uses at the site.[29]

B. The Project Fails to Ensure Compliance with the County Development Code and General Plan

The Development Code contains standards governing the development of specific land uses and activities within the County, including solar projects.[30] Section 1112(B) applies to development of "commercial solar electric generating facilities" in agricultural zones.[31] The Project is proposed to be located in an Exclusive Agriculture zoning district, and is therefore subject to Section 1112(B).[32] Section 1112(B)(2)(a) provides that commercial solar projects must be sited on agricultural lands designated as lower priority under the General Plan:

> The proposed [commercial solar] site shall be located in an area designated as either "Very Low Priority," "Low Priority," or "Low-Medium Priority" land according to Figure RC-13 Priority Agricultural Land (2035 Kings County General Plan, Resource Conservation Element, Page RC-20). "Medium Priority" land may be considered when comparable agricultural operations are integrated, the standard mitigation requirement is applied, or combination thereof.[33]

The Staff Report and Addendum fail to discuss Section 1112(B), and fail to state whether the Project site lands are designated as "Very Low Priority," "Low Priority," "Low-Medium Priority," or "Medium Priority" under Figure RC-13 of the General Plan's Resource Conservation Element.[34] Buried in Appendix A to the Addendum, the redlined MND states that the Project site is designated as "Medium Priority" pursuant to Figure RC-13.[35] This is also apparent from a comparison with Project mapping (see figures below).

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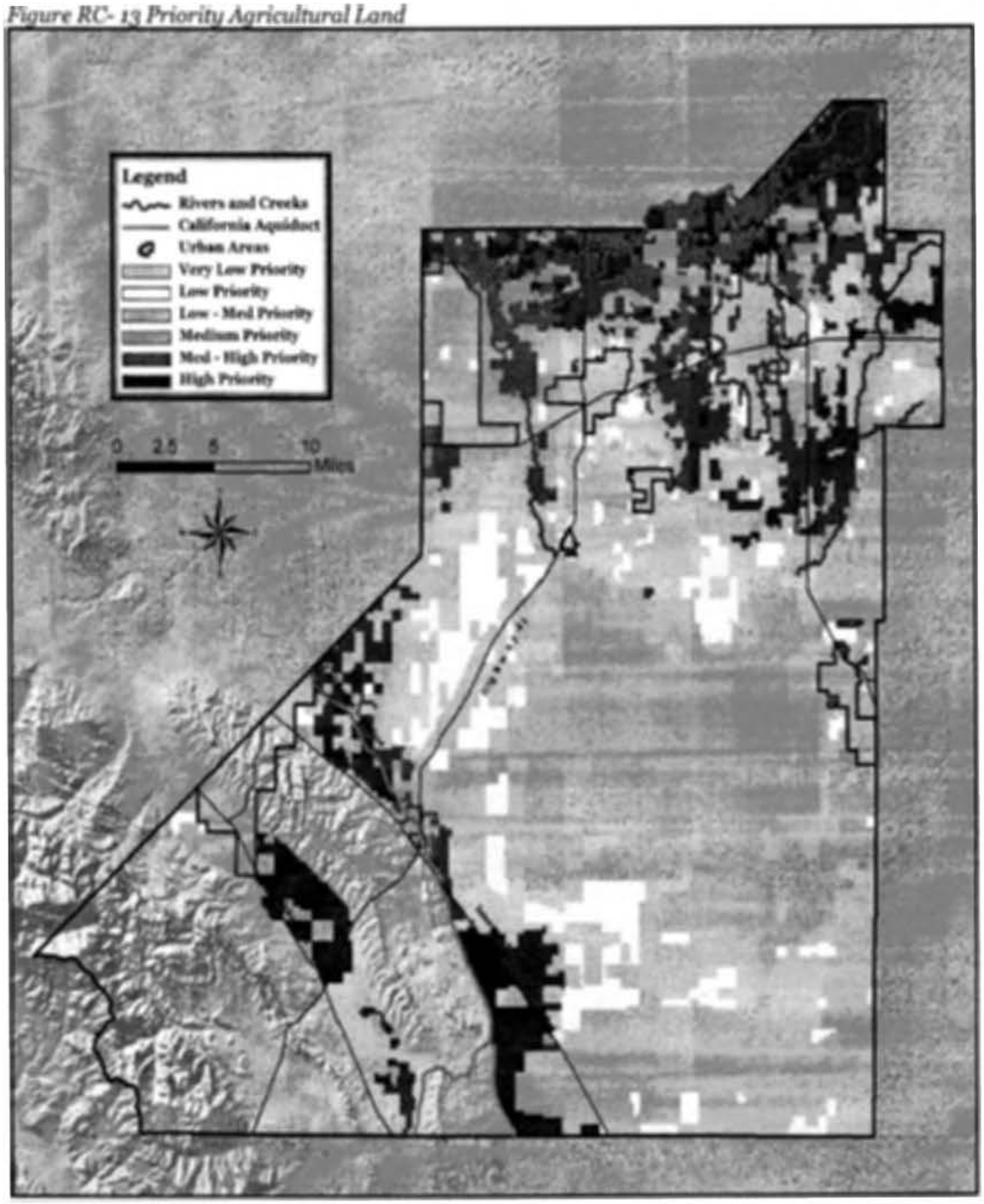
[29] Dev. Code § 1112(B)(2)(a).
[30] Dev. Code, Article 11, Standards for Specific Land Uses and Activities.
[31] Dev. Code § 1112.
[32] Staff Report, p. 1.
[33] Dev. Code § 1112(B)(2)(a).
[34] See e.g. Addendum, pp. 53-57 (Agricultural Resources).
[35] 2010 MND, p. 3.2-1.

Figure RC- 13 Priority Agricultural Land



Since the Project site is considered "Medium Priority," Development Code Section 1112(B)(2)(a) should require that the Project include "comparable" agricultural operations or provide mitigation for the loss of the "Medium Priority" use. However, this requirement is never discussed.

Instead, the Staff Report and Addendum discuss County Resolution No. 13-058 (2013). Resolution No. 13-058 amended the County's "Implementation Procedures for the California Land Conservation "Williamson" Act of 1965 Including Farmland Security Zones ("Implementation Procedures") and established a process for evaluating growing conditions on agricultural lands in the vicinity of the Project site on a site by site basis to determine whether certain agricultural uses can be deemed "compatible" with solar use.[36] Under the amended Implementation Procedures, the County may make a finding of agricultural "compatibility" if the County has substantial evidence that current soil conditions impair agricultural use to the extent that the solar project will not interfere with agricultural operations and will instead provide a "compatible" operation at the site.[37] The Staff Report and Addendum appear to generally rely on Resolution No. 13-058 to conclude that the proposed sheep grazing operation will satisfy all County agricultural requirements related to solar development.[38]

However, Resolution No. 13-058 does not exempt a project from complying with the Development Code because it did not amend either the Development Code or the General Plan. Therefore, the Implementation Procedures do not negate the Development Code's mandatory requirement that solar projects built on "Medium Priority" agricultural sites, as defined by the General Plan, must either maintain "comparable" agricultural use or provide compensatory mitigation for loss of agricultural use.[39] The Project proposes to eliminate the Original Project's agricultural mitigation requirement, but the Staff Report and Addendum fail to provide any analysis of whether the proposed sheep grazing operation is "comparable" to the existing alfalfa, tomato, and cotton farming operations at the site.

Furthermore, even with respect to the compatibility findings that the County is required to make under Resolution No. 13-058, the Addendum fails to include any evidence to support such findings because the Agricultural Management Plan ("AMP") on which the County intends to rely to determine whether ongoing sheep grazing is a

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[36] Staff Report, p. 14.
[37] *Id.*; see Exhibit C, November 26, 2013 County Staff Report for Resolution 13-058.
[38] Staff Report, p. 14.
[39] Dev/ Code § 1112(B)(2)(a).

"reasonably forseeable" use is not contained in the Addendum. The County therefore lacks substantial evidence to make a finding that Project's proposed agricultural operation will comply with the Development Code without compensatory mitigation.[40]

III. THE PROJECT DOES NOT COMPLY WITH CEQA

A. An EIR or Revised MND is Required for the Project Because Substantial Changes Render it a New Project Under CEQA

The Project proposes substantial changes to the Original Project that were not analyzed in the 2010 MND. These changes will result in a new agricultural use at the site, an increased Project footprint, reduced mitigation for biological and agricultural impacts, and a potentially significant increase in air quality and traffic impacts from a shortened construction period. These changes amount to a "new project" requiring a full EIR because the Project proposes substantial modifications from the project that was analyzed in the 2010 MND and original CUP proceedings.

When a modification to a previously approved project introduces substantial changes that will result in "new significant environmental effects or a substantial increase in the severity of previously identified significant effects," the project should be treated as a new project requiring renewed CEQA review.[41] This concept derives from CEQA's requirement that an EIR analyze the whole of a project, which consists of the "activity which is being approved" rather than simply the "approvals" themselves.[42] If the prior CEQA document failed to analyze the new activities proposed by a project modification, a new round of CEQA review with public comment is required.[43] In such instances, the fair argument standard applies to an agency's decision of whether or not to prepare an EIR, rather than the substantial evidence

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[40] The Project's inconsistency with this Development Code and General Plan requirement is also a per se significant impact under CEQA. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4 (project's inconsistencies with local plans and policies constitute significant impacts under CEQA); *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.
[41] *Save Our Neighborhood v. Lishman* ("*Lishman*") (2006) 140 Cal. App. 4th 1288, 1296-97 (proposed project "modification" that did not involve minor technical changes or additions to previously approved project, but instead introduced substantial changes that would result in "new significant environmental effects or a substantial increase in the severity of previously identified significant effects" is new project requiring renewed CEQA review); *Sierra Club v. County of Sonoma* (1992) 6 Cal. App. 4th 1307, 1323.
[42] PRC § 21065; 14 CCR § 15378(a).
[43] *Lishman*, 140 Cal. App. 4th at 1296-97; Sierra Club, 6 Cal. App. 4th at 1323.

standard that would apply to supplemental environmental review of previously approved projects under CEQA Section 21166.[44]

The fair argument test mandates preparation of an EIR in the first instance whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. If there is substantial evidence of such an impact, contrary evidence is not adequate to support a decision to dispense with an EIR.[45] Section 21151 creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. By contrast, "[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired, and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process."[46]

In *Sierra Club*, a mining company's application to transfer an existing mining designation to a new parcel and obtain a new use permit for operations on that parcel was considered a new project not previously analyzed in the County's mining plan EIR. Similarly, in *Lishman*, the court held that an EIR addendum to a previously approved MND was inappropriate, and a supplemental MND or EIR was required, to analyze the impacts from the change in the number of units, grading, road construction and modification of a wetlands drainage channel for a hotel project.[47] Finally, in *Burbank-Glendale-Pasadena Airport Authority v. Hensler*,[48] the court required an airport authority to prepare an EIR to analyze modifications to an airport runway extension project where the original MND prepared for the project had failed to address the scope of the modifications, the need to acquire private property for the new use, and contained an erroneous description of the physical perimeter of the airport. The *Burbank* court explained the need for a new CEQA document for the proposed modifications:

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[44] *Sierra Club*, 6 Cal. App. 4th at 1317-1319.
[45] PRC § 21151; 14 CCR § 15064(g), (h).
[46] *Sierra Club* at 1317.
[47] *Lishman* at 1292. *Lishman* is the sole reported case addressing application of section 21166 to an approval, where, as here, the original approval was based on a negative declaration supplemented with an addendum. The recent case of *Friends of the College of San Mateo Gardens v. San Mateo County Comm College Dist.* ("*San Mateo Gardens*"), 2013 WL 5377849, 9/26/2013, also struck down the agency's use of an addendum to analyze revisions to a project that was originally approved on an MND. *San Mateo Gardens* is currently pending before the Supreme Court.
[48] (1991) 233 Cal. App. 3d 577, 594 ("*Burbank Airport*").

> We can only conclude on our record that the project which was the subject of the 1985 negative declaration was a substantially different project than the one which was the basis of Resolution No. 224. Because there is no evidence that the Authority, in adopting Resolution No. 224, ever conducted a threshold initial study under CEQA, or considered the issue of whether an additional environmental document needed to be prepared due to subsequent changes in the project (see Guidelines, § 15162), these issues are ones, among others raised by appellant, which should be addressed by the Authority in the first instance.[49]

Here, just as in *Sierra Club*, the Project will occupy new parcels of property that were not known, and were not analyzed, in the original MND. The Project also proposes to eliminate the previously approved requirement to provide 498 acres of mitigation habitat for Swainson's hawk, and to drastically shorten the Project construction schedule from 35 months to 15-18 months. The modified construction schedule will increase the number of construction worker trips from 105/day to 1200/day, and will increase the total number of construction-related vehicle trips from 96/day to 2412/day.[50] Just as in *Lishman*, the Project will result in substantial modifications to the previously analyzed construction component of the Project. Furthermore, the Applicant is proposing to add a new seasonal sheep grazing operation to the previously approved 125MW solar facility.[51] Just as in *Burbank Airport*, the 2010 MND made no reference to maintaining on-site agricultural operations, and did not consider the physical components of this addition to the Project. Finally, as discussed further below, the Applicant proposes to delete two mitigation measures from the Original Project, including the requirements to provide 498 acres of mitigation habitat for Swainson's hawk, and 978 acres of agricultural conservation easement lands.[52],[53]

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[49] *Id.*.
[50] Addendum, p. 17.
[51] Staff Report, pp. 53-57.
[52] Staff Report, pp. 17, 33.
[53] Mr. Cashen's comments also provide substantial evidence supporting a fair argument that elimination of the Swainson's hawk measures is likely to have significant impacts that the County has not adequately analyzed and mitigated. Also, the County lacks substantial evidence to support its conclusion that elimination of the agricultural mitigation lands will not have a significant impact on agriculture because the Addendum fails to provide an analysis to confirm whether the Project's proposed grazing operations will remain viable through the life of the Project.

None of these proposed changes in construction and operation of the Project were analyzed in the Original Project MND, or even known at the time the Original Project was approved. This is therefore a new project for which a new EIR or revised MND is required.

B. The Project Proposes to Delete Previously Approved Mitigation Measures Without Preparing a New CEQA Document and Circulating It for Public Comment

The Applicant asks the County to delete two previously adopted mitigation measures from the Original Project. PDF-BIO 1 requires the Applicant to provide 498 acres of mitigation habitat lands for Swainson's hawk. Condition of Approval No. 21 requires the Applicant to set aside or fund 978 acres of agricultural conservation easement lands.[54] The County cannot authorize the removal of these mitigation measures without preparing a subsequent MND or EIR to analyze the impacts of its actions in a CEQA document, and without providing a public comment period. CEQA mandates that "where a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation—whether or not the approval is ministerial—without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence."[55] The County has failed to comply with this requirement.

1. Swainson's Hawk.

PDF-BIO 1 requires the Applicant to set aside a 489-acre easement as foraging habitat for Swainson's hawk. The measure was adopted into the Mitigation Monitoring and Reporting Program ("MMRP") for the Original Project to mitigate the loss of foraging habitat caused by installation of the 125MW solar farm.[56] In 2010, the MND concluded that the impacts on Swainson's hawk from the Project would be significant and that mitigation was necessary to reduce the impacts to less than significant levels.[57]

In 2011, a year after the Original Project was approved, GWF Solar wrote a letter to the County Planning Division to ask whether CUP 10-05 could be amended to

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[54] Staff Report, pp. 17, 33.
[55] *Katzeff*, 181 Cal.App.4th at 614, citing *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491.
[56] MND, p. 3.2-4.
[57] *Id.*

remove this mitigation measure.[58] The County's response recognized that subsequent CEQA review would be required in order to remove the mitigation.

> It is possible to amend the existing approval of CUP No. 10-05, if new information is provided showing that the loss of Swainson's hawk foraging habitat is not significant and that mitigation is not necessary. However, ***the Mitigated Negative Declaration (MND) that was previously approved for CUP No. 10-05 would need to be revised to reflect the new information, and re-circulated for a new public review period***, before the amendment could proceed to the Planning Commission for a new public hearing.[59]

The County now proposes to delete the same mitigation measure without preparing a new MND and without recirculating a new MND for public comment. This contradicts the County's prior representations to the Applicant (and the public) and is prohibited by CEQA. Where a mitigation measure or condition has been required for an approved project, that mitigation may only be modified or removed through a subsequent CEQA review process.[60] In *Katzeff*, the Department of Forestry ("DPF") approved permits allow a timber owner to cut down a wind buffer tree zone that had been previously adopted as a mitigation measure under a timber harvesting plan, without first conducting CEQA review for the removal of the buffer zone. The court held that the condition could not be eliminated on a ministerial basis, and instead required full CEQA review to justify its elimination. The court explained that "where a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation . . . without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence."[61] Otherwise, "any mitigation required by CEQA . . . could be nullified simply by the passage of time . . ."[62]

The County's reliance on a CEQA Addendum is akin to DPF's ministerial removal of the buffer zone requirement in *Katzeff*. An addendum is authorized only

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[58] See Exhibit A.
[59] *Id.* at p. 1 (emphasis added).
[60] *Katzeff*, 181 Cal.App.4th at 614.
[61] *Id.* at 611.
[62] *Id.* This same result was reached in *Lincoln Place Tenants v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1507 n22, which holds that "it cannot be argued CEQA does not apply to the . . . demolition on the ground the demolition permits are ministerial acts."

for "minor technical changes" to an approved project, and does not provide a public comment period.[63] In approving a project modification based on an addendum, the County has no duty to respond to public comments even if they are submitted.[64] Thus, as with a ministerial approval, the public has no meaningful opportunity to comment on an addendum, nor is an addendum required to respond to those comments or provide the level of detailed analysis required for an MND or EIR. The Addendum is therefore the functional equivalent of a ministerial approval for purposes of the proposed deletion of Measure PDF-BIO 1. This is not the informational result intended by CEQA. An EIR or new MND must be prepared to analyze the deletion of mitigation.

The County also lacks substantial evidence to support its conclusion that the deletion of Measure PDF-BIO 1 will not result in significant impacts to Swainson's hawk because the County did not conduct a new biological analysis in preparing the Addendum. The County relies on a 2012 study, the Estep Report, prepared for a different set of Kings County solar projects, to conclude that PDF-BIO 1 is no longer necessary mitigation for the Project site.[65] The Estep Report analyzed impacts on Swainson's hawk at three solar project sites located west of the Project site.[66] The Estep Report concluded that little or no mitigation was required for the loss of Swainson's hawk foraging habitat at the adjacent project sites.[67] However, the Estep Report is four years old, and was prepared for a different project. Mr. Cashen explains that the Estep Report contains fundamental flaws in its analysis that preclude reliance on the Report as substantial evidence of impacts to Swainson's hawk from the Project.

Mr. Cashen explains that the Estep Report was based on an assumption that Swainson's hawks require an average of 6,820 acres of foraging habitat.[68] However, Estep's analysis is considered an "outlier" among biologists. As explained by Mr. Cashen, biologists generally report a considerably larger mean home range size of 9,978 acres.[69] In addition, Mr. Cashen explains that the Estep Report failed to take into account variations in Swainson's hawk home range size that may be present in the Project area. Furthermore, Mr. Cashen noted that the Estep Report failed to

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[63] 14 CCR § 15164.
[64] *Id.*
[65] Staff Report, p. 58.
[66] *Id.*
[67] *Id.*
[68] Exhibit B, p. 5.
[69] *Id.*

consider impacts on the loss of foraging habitat at the Project site.[70] Finally, because the Estep Report did not analyze the Project, it did not discuss whether the Project's proposed sheep grazing operation would, or would not, provide suitable foraging habitat for Swainson's hawk at the Project site. Mr. Cashen concludes that the County's proposal to forego compensatory mitigation based on the Estep Report conflicts with existing CDFW mitigation guidelines and does not meet the State's requirement for "full mitigation" for impacts to listed species.[71] CDFW's "full mitigation" standard requires mitigation to be roughly proportional to the extent of the impacts of a given taking,[72] and is intended to ensure that the status of the species is the same or better after project and mitigation implementation as it was prior to project implementation.[73]

The County further proposes to defer its study of impacts to Swainson's hawk to a future, post-approval time, and then possibly require the Applicant to pay an in lieu mitigation fee at a 0.5/1 mitigation ratio if significant impacts are discovered.[74] There is no new biological study to support the County's conclusions regarding this modification. Deferring the threshold determination of whether the modified project and the deletion of previously approved mitigation measures will, or will not, have significant impacts does not constitute substantial evidence that deletion of Measure PDF-BIO 1 is appropriate.

2. *Agricultural Mitigation Lands.*

The Addendum suffers from a similar flaw in its proposal to delete Condition No. 21 without preparing a subsequent MND or EIR. Condition No. 21 requires the Applicant to provide a conservation easement to mitigate the loss of 978 acres of farmland of statewide importance.[75]

Conditions of approval are designed to limit permitted uses at a project site, and are commonly used by lead agencies to incorporate required mitigation measures

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[70] *Id.*
[71] *Id.*
[72] 14 CCR § 783.4.
[73] See Swainson's Hawk Survey Protocols, Impact Avoidance, and Minimization Measures for Renewable Energy Projects in the Antelope Valley of Los Angeles and Kern Counties, California State of California California Energy Commission and Department of Fish and Game, June 2, 2010 at p. 2, available at https://www.dfg.ca.gov/wildlife/nongame/survey_monitor.html.
[74] Staff Report, pp. 18-19 ("To update this report and adapt it to the proposed project, nesting surveys shall be conducted in two phases...").
[75] Staff Report, p. 33.

into the use permit.[76] The purpose of such conditions is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.[77] Thus, conditions of approval are the functional equivalent of mitigation measures in that they are mandatory, and the Applicant's failure to carry out those conditions is a material breach of its use permit, as well as a violation of CEQA. *Id.*

The County contends that Condition No. 21 is no longer necessary because the proposed sheep grazing operation will keep the Project site in active agricultural use. However, as discussed above, the County has not yet prepared the AMP, leaving several unresolved questions regarding the adequacy and viability of the proposed grazing operation. First, the Addendum fails to account for the reduced carrying capacity of the agricultural resource caused by the acreage occupied by the solar panels. Second, since there is no AMP in the Addendum, it is impossible to determine whether the Project site would be agriculturally restored and seeded to forage forbs and grasses, or whether the Applicant merely intends to let grow whatever can survive the Project installation. Lastly, there is no mention of animal safety or protection of solar panels from damage by Project sheep. The Addendum fails to discuss whether the sheep's proximity to the solar panels poses a risk of injury to either the animals or the equipment, and, if so, how the Applicant proposes to mitigate those risks. There is also no evidence that the Applicant has any experience in running an agricultural operation or will be able to sustain it for the life of the Project.[78]

The County purportedly relies on the AMP to "analyze existing and future agricultural conditions at the Project site," as well as to "describe how the applicant will ensure the site retains onsite agricultural activity sufficient to meet the compatibility requirements of Resolution 13-058."[79] However, since the AMP has not been prepared, neither the Applicant nor the County have yet performed the threshold analysis required to determine whether the elimination of the conservation easement will be adequately mitigated by the Project's proposed grazing operation.

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[76] PRC § 21081.6(b); 14 CCR § 15126.4(a)(2) (mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments).
[77] *Katzeff*, 181 Cal. App. 4th at 613; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261.
[78] See e.g. http://www.firstsolar.com/en/About-Us.aspx (First Solar "About Us" page indicates that the Applicant "is a global leader in photovoltaic (PV) solar energy solutions," but contains no discussion of agricultural projects.
[79] Addendum, Appendix A, Revised MND, p. 68.

The County must justify its decision to delete this Condition of Approval with a thorough CEQA analysis. If that analysis concludes that deletion of the Condition is unjustified, the County must continue to require sufficient compensatory mitigation to offset the Project's agricultural impacts.[80]

C. The Addendum Fails to Disclose Baseline Conditions at the Project Site

The Addendum fails to include information about current baseline conditions at the Project site against which to compare the Project's impacts. Alternatively, the Addendum relied on a legally erroneous baseline which purports to consider the "baseline" to be the hypothetical situation in which the Project, as originally approved, was already constructed.[81] In either case, the failure to describe the baseline is legal error.

Every CEQA document must describe the "baseline" upon which the significance of impacts is measured. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts.[82] Section 15125(a) of the CEQA Guidelines[83] states in pertinent part that a lead agency's environmental review under CEQA:

> "...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant."[84]

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[80] *Katzeff*, 181 Cal. App. 4th at 614.

[81] Citizens anticipates that the County may argue that it is not required to state the existing level of operations because it is relying on the original MND, which previously analyzed maximum permitted levels for the Original Project. PRC § 21166; *Benton v. Bd. Of Supervisors* (1991) 226 Cal. App. 3d 1467. However, those standards do not apply to a baseline determination. The CEQA baseline for the Project must be the actual level of operations at the time of the current CUP application. 14 CCR § 15125(a).

[82] *Communities for a Better Environment v. So Coast Air Qual. Mgmnt. Dist.* ("*CBE v. SCAQMD*") (2010) 48 Cal. 4th 310, 321.

[83] 14 CCR § 15125(a).

[84] See *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 ("*Save Our Peninsula*").

In *CBE v. SCAQMD*, the Supreme Court held that the CEQA baseline is ***not*** the maximum permitted limit, but rather, the actual level of operations that exists at the time CEQA review is performed.[85] Here, that time is when the Addendum was prepared. The Supreme Court explained:

> Like an EIR, an initial study or negative declaration "must focus on impacts to the existing environment, not hypothetical situations." (*County of Amador v. El Dorado County Water Agency,* 76 Cal.App.4th at p. 955.) An approach using hypothetical allowable conditions as the baseline results in "illusory" comparisons that "can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts," a result at direct odds with CEQA's intent. (*Environmental Planning & Information Council v. County of El Dorado,* 131 Cal. App. 3d at p. 358.) The District's use of the prior permits' maximum operating levels as a baseline appears to have had that effect here, providing an illusory basis for a finding of no significant adverse effect despite an acknowledged increase in NOx emissions exceeding the District's published significance threshold.[86]

Using a baseline based on maximum permitted operations, "mislead(s) the public" and "draws a red herring across the path of public input."[87] The sole exception to using the actual environment as the CEQA baseline is when the project proponent proposes to complete the exact same project that was approved in the past, and build it out only to the level that was previously permitted and subjected to CEQA analysis.[88] In such cases, no further CEQA review is necessary, and thus no new baseline analysis is needed, because there are no changes to the project that was previously approved. Thus, if the Applicant had simply purchased the entitlements for the Original Project, and sought to construct it as approved, it could do so without further CEQA review. Here, however, the Applicant is proposing substantial

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[85] *CBE v. SCAQMD*, 48 Cal. 4th at 322.
[86] *Id.*
[87] *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711.
[88] See *Committee for a Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 Cal. App. 3d 847, 862–865 (restoration of a sewage treatment plant's operation to the originally approved level was the continued operation of an existing facility and did not require supplemental CEQA analysis).

modifications to the Project. Therefore, the CEQA baseline upon which to measure the impacts is the actual environment at the time such modifications are proposed.

The Addendum suffers from precisely this fundamental error throughout.

1. Biological Resources.

The Addendum fails to provide current information on baseline biological conditions at the Project site for any wildlife and plant species, including special-status species that are the subject of Project mitigation measures, such as Swainson's hawk, San Joaquin kit fox, and burrowing owl, including those mitigation measures that the Applicant now proposes to eliminate. The only exception to this are December 2014 surveys that were not included in the Addendum but that the Applicant purportedly performed for Swainson's hawk on the new Project parcels totaling 10 acres.[89] The Applicant did not survey the other 900+ acres of the Project site, despite proposing changes to mitigation for impacts on those 900+ acres.[90] Thus, the Addendum's baseline information for biological resources is incomplete, inaccurate and out-of-date.

2. Hazardous Materials.

The Addendum fails to include baseline information about existing hazardous materials conditions at the new Project parcels. The 2010 MND included a Phase I Environmental Site Assessment ("ESA") for the Original Project site.[91] However, the Phase I ESA did not analyze the 4 new parcels that the Project proposes to add. Like the rest of the Project site, the new parcels are currently active agricultural land.[92] They are therefore likely to contain some historic pesticide contamination. The new parcels are also located in the vicinity of a formerly used defense site ("FUDS") which has historic soil contamination from prior military uses.[93] The Addendum fails to discuss or disclose whether the new parcels contain any existing contamination that may be disturbed during Project construction.

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[89] Addendum, p. 58.
[90] *Id.*
[91] Addendum, Appendix A, p. 126.
[92] Staff Report, p. 2.
[93] See Exhibit D (Envirostor data).

3. Air Quality.

The Addendum fails to include baseline information about the current state of air quality in the San Joaquin Air Basin, which is necessary to valuate whether the shortened construction period will result in significant impacts.[94] The Addendum refers to information from 2009 about the Air Basin's pollutant levels and attainment status for various pollutants.[95] This is the same information referenced in the 2010 MND and is clearly out-of-date. The Addendum admits that the Project will have significantly increased construction emissions, but concludes that the emissions remain less-than-significant with mitigation.[96] Without current information about the state of air quality in the Air Basin against which to compare the revised emissions, the Addendum's significance conclusions remain unsupported.

4. Traffic.

The Addendum fails to include baseline information about existing traffic which is necessary to evaluate traffic from the modified Project. The Project's shortened construction schedule will cause a significant increase in the number of construction worker trips estimated for the Original Project from 105/day to 1200/day, and will increase the total number of construction-related vehicle trips from 96/day to 2412/day.[97] However, similar to the deficiencies in the Air Quality analysis, the Addendum refers only to outdated traffic counts and levels of service ("LOS") from 2009 and 2010.[98] This information fails to set forth the existing setting and fails to support the Addendum's significance conclusions.

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[94] Citizens notes that there are inherent inconsistencies in the baseline information provided in the Addendum for biological resources, air quality, and traffic. Despite the fact that all three of these issues have new impacts resulting from the Project changes, the Addendum provides some current baseline information for Swainson's hawk (December 2014 surveys of new parcels), and some recent air quality information, yet continues to rely on certain outdated air quality and traffic baseline information from the original MND. See Addendum, Appendix A, pp. 75-77; 168-169.
[95] See e.g. Addendum, Appendix A, p. 74.
[96] Citizens reserves the right to file supplemental comments on the adequacy of the Addendum's new air quality modeling and analysis.
[97] Addendum, p. 17.
[98] Addendum, Appendix A, pp. 16-169.

5. Cumulative Impacts.

The Addendum contains no information or analysis whatsoever about cumulative impacts. This is a fatal deficiency in the County's CEQA analysis.[99] The Addendum is replete with references to other solar and renewable energy projects that have been approved since the Original Project was considered in 2010.[100] These new projects are therefore reasonably forseeable cumulative developments in the vicinity of the Project. However, the Addendum fails to incorporate these other projects into a cumulative impacts analysis. These other projects, along with any other past, present, and reasonably probable future projects in the geographical vicinity of the Project site must form the baseline for an assessment of the Project's cumulative impacts to air quality, agricultural resources, traffic, biological resources, and all other relevant cumulative impacts.

D. The Project Meets the Criteria for a Subsequent CEQA Document[101]

After an MND has been adopted, a subsequent or supplemental MND or EIR is required to be prepared in any of the following instances: (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report; (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.[102]

As discussed above, the Applicant proposes substantial changes to the Original Project that more than satisfy Section 15162(a) criteria for changes in a project

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[99] CEQA requires the agency to consider "past, present, and probable future projects producing related or cumulative impacts." PRC § 21083; 14 CCR §15130(b)(1)(A); *CBE v. CRA*, 103 Cal.App.4th at 117.
[100] See e.g. Exhibit A, County references to 2010 Proposed RE Kansas South LLC Solar Generation Facility; Staff Report, pp. 58 (proposed RE Mustang, LLC, RE Orion LLC, and RE Kent South LLC Solar Generation Facilities).
[101] As discussed above, the fair argument standard applies in situations such as this one where an applicant proposes substantial changes to a project that amount to a "new" project, but the agency fails to prepare an MND or EIR to analyze the project changes. *Sierra Club*, 6 Cal. App. 4th at 1317-19; *Burbank Airport*, 233 Cal. App. 3d at 594. However, in this case, Project impacts and informational deficiencies in the Addendum are so significant that they equally meet the standards requiring preparation of a subsequent CEQA document under PRC § 21166 and 14 CCR § 15162.
[102] PRC § 21166; 14 CCR §§ 15162(a), (b).

triggering the need for a subsequent EIR. Additionally, as discussed below, there have been substantial changes in the circumstances surrounding the Project site from newly approved facilities, increased regional air pollution and traffic, and new information about biological resources impacts which the Addendum failed to address, and which require preparation of a subsequent EIR.

1. The Project's Proposal to Delete the Existing Swainson's Hawk Mitigation and Replace it With 0.5:1 Compensatory Mitigation Will Have New and More Severe Significant Impacts On Swainson's Hawk.

The Addendum proposes to remove the existing requirement to set aside a 498-acre easement for Swainson's hawk and replace it with possible habitat compensation at a 0.5:1 ratio if a later-conducted census-level analysis determines that the Project will result in a significant reduction of available Swainson's hawk agricultural foraging habitat.[103] Mr. Cashen explains that the newly proposed mitigation ratio is not consistent with CDFW guidelines and, thus, does not ensure that the Project's impacts on Swainson's hawk will be mitigated to less than significant levels.[104]

CDFW mitigation guidelines apply to all projects that would affect foraging habitat within 10 miles of an active nest, with no exceptions.[105] CDFW mitigation guidelines indicate projects within five miles of an active nest tree shall provide minimum habitat compensation at a 0.75:1 ratio.[106] Active nest sites used by Swainson's hawks are known to occur within five miles of the Project site (Figure 4).[107] Even if the County determines the Project would not cause a significant reduction in available foraging habitat for the Swainson's hawk territories in the study area, habitat compensation is required at a minimum 0.75:1 ratio to support the needs of additional territories as the existing impaired population of Swainson's hawk located near the Project site recovers. Mr. Cashen concludes that, absent this heightened mitigation level, the Project's impacts to Swainson's hawk will remain inadequately mitigated and significant.[108]

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[103] Staff Report, pp. 58-59.
[104] Exhibit B, p. 10.
[105] *Id.*; Exhibit B, p. 10.
[106] California Department of Fish and Game. 1994. Staff report regarding mitigation for impacts to Swainson's hawks (*Buteo swainsoni*) in the Central Valley of California. p. 12.
[107] Live Oak Associates. 2015. Biological Evaluation for the Westside Solar Project. Figure 5. Available at: < http://www.countyofkings.com/home/showdocument?id=8779>.
[108] Exhibit B, pp. 10-11.

2. *The Project's Newly Shortened Construction Schedule May Have New and More Severe Significant Impacts On Traffic and Air Quality.*

Citizens and its technical consultants are currently reviewing the Addendum's air quality and traffic analyses. The Addendum acknowledges a major increase in construction emissions and construction traffic resulting from the new Project's shortened 15-18 month construction period. A preliminary review indicates that the County may have underestimated construction air emissions and traffic impacts. Citizens reserves the right to provide further comments on the Project's impacts on traffic and air quality following the completion of our review and at subsequent proceedings for the Project.

3. *Substantial Changes Have Occurred with Respect to the Circumstances Under Which the Project is to Be Undertaken Which May Substantially Increase the Severity of the Project's Cumulative Impacts.*

Numerous new renewable energy projects have been approved since the Original Project was considered in 2010.[109] These projects, at a minimum, along with any other past, present, and reasonably probable future projects in the geographical vicinity of the Project site must be included in an analysis of the Project's cumulative impacts to air quality, agricultural resources, traffic, biological resources, and all other relevant cumulative impacts.

4. *New Information Shows that the Project Will Have Significant Impacts on Biological Resources.*

a. Avian Collision Hazards.

Since the original CUP for the Project was approved in 2010, the scientific community has acquired evidence that solar projects pose a threat to birds. Whereas the extent of the threat remains unknown, the recent presence of dead and injured birds at solar facilities operating (or under construction) in California demonstrates that solar arrays presents a significant collision hazard to birds. Mr. Cashen explains the issue:

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[109] See e.g. Exhibit A, County references to 2010 Proposed RE Kansas South LLC Solar Generation Facility; Staff Report, pp. 58 (proposed RE Mustang, LLC, RE Orion LLC, and RE Kent South LLC Solar Generation Facilities).

> At PV facilities, birds appear to mistake the broad reflective surfaces of the solar arrays for water, trees, and other attractive habitat. When this occurs, the birds become susceptible to mortality by: (a) colliding with the solar arrays; or (b) becoming stranded (often injured) on a substrate from which they cannot take flight, thereby becoming susceptible to predation and starvation.[110]

There is also recent evidence that PV solar panels produce polarized light pollution that attracts insects, which in turn attract insect-eating birds.[111] Those birds then become susceptible to injury or death because they cannot distinguish insects on a PV panel from insects that really are on (or in) attractive habitat. Dead and injured insectivores then attract avian predators and scavengers, which too become susceptible to collision with the PV panels and other project features.

Incidents of reported bird deaths and related studies on avian collision hazards with PC panels are new information that has resulted in recent conclusions by biologists and regulatory agencies that avian collisions are a significant impact of solar PV projects like the Project. Recent biological studies reported in 2014 demonstrate that avian collision poses risks not only to birds but can render an entire food chain vulnerable to injury and death.[112] In May 2014 the U.S. Fish and Wildlife Service ("USFWS") sent a letter to solar developers in California and Nevada, stating: "recent information collected at solar facilities by Service personnel indicates that wildlife, particularly avian species, can be negatively affected by solar energy development." The letter identified mitigation measures and warned that unmitigated solar projects could result in unpermitted "take" of species protected under the Endangered Species Act and the Migratory Bird Treaty Act.[113]

The Addendum provides no analysis of avian collisions with the Project's solar facilities. Substantial evidence shows that impacts due to avian collisions are potentially significant and must be mitigated. Consequently, the County must analyze the avian collision hazard as a potentially significant impact, and it must provide adequate mitigation.

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[110] Exhibit B, pp. 5-6; see also Exhibit E, Scientific American, Solar Farms Threaten Birds, August 27, 2014, available at http://www.scientificamerican.com/article/solar-farms-threaten-birds/.
[111] *Id.*
[112] See Exhibit B, pp. 5-6.
[113] *Id.*

b. Burrowing Owl.

New information demonstrates that the mitigation measures described in the 2010 MND are no longer accepted by CDFW, the regulatory agency responsible for the listing and protection of burrowing owl, because the mitigation measures in the 2010 MND have *proven ineffective* in the conservation of burrowing owls.[114]

Burrowing owls are a California Species of Special Concern. The 2010 MND found significant impacts to burrowing owl and relied on CDFW's 1995 Staff Report to select mitigation measures for the Original Project. The Addendum proposes to adopt the same mitigation measures. However, in 2012, CDFW issued a revised Staff Report on Burrowing Owl Mitigation, the CDFW 2012 Guidelines. The CDFW 2012 Guidelines include new information that did not exist at the time the original MND was approved, including new information pertaining to the status of the burrowing owl population in the State, methods that should be used for surveys and impact assessments, and mitigation measures that should be implemented to avoid and minimize impacts to the species.[115]

The CDFW 2012 Guidelines identify specific mitigation measures to mitigate project impacts to burrowing owl that are considerably different from the mitigation measures analyzed in the original MND. If implemented, the measures set forth in the CDFW 2012 Guidelines would substantially reduce the Project's impacts to burrowing owl. The Addendum improperly failed to consider these new mitigation measures.[116]

E. The Addendum Improperly Defers Impact Analyses By Deferring the Creation of Mandatory Plans and Mitigation Measures

The Addendum improperly defers the County's analysis of Project impacts on agricultural lands, air quality, biological resources, and decommissioning by relying on Conditions of Approval and mitigation measures which purportedly require the creation of mitigation plans based on future analysis. This is prohibited by CEQA.

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[114] See Exhibit B, p. 13; California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. Available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>, p. 1.

[115] *Id.*

[116] 14 CCR § 15162(a)(3)(D).

A lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding.[117] An agency abuses its discretion by failing to proceed in a manner required by law when it fails to address a potentially significant impact in the EIR.[118] In particular, a "clearly inadequate or unsupported study is entitled to no judicial deference."[119]

1. Agricultural Management Plan.

As discussed above, the County purportedly relies on the AMP to "analyze existing and future agricultural conditions at the Project site" and to "describe how the applicant will ensure the site retains onsite agricultural activity sufficient to meet the compatibility requirements of Resolution 13-058."[120] However, since the AMP has not been prepared yet, neither the Applicant nor the County have performed the threshold analysis required to determine whether the Project's elimination of Condition No. 21's agricultural conservation easement will be adequately mitigated by the Project's proposed grazing operation.

2. Air Quality.

The Addendum fails to include the Project's proposed Dust Control Plan, and fails to state whether the Applicant has initiated compliance proceedings with the Air District for Rule 9510 pursuant to Air District Rule 9510. Proposed Mitigation Measure PDF AQ-1 requires the Applicant to submit its Air Impact Assessment ("AIA") application to the Air District.[121] Since this mitigation measure will not become effective until the Project is approved, compliance with Measure PDF AQ-1 will not be triggered unless or until the County approves the Project's MMRP. However, Rule 9510 requires the AIA to be submitted to the Air District "not later than" the time at which the applicant submits its application to the lead agency for final discretionary approvals.[122] Thus, the Applicant should have already submitted its AIA to the Air District at the time it submitted its CUP extension application to the County in 2015. The Addendum should have disclosed the status of the Applicant's AIA application, and whether and to what extent the Project would be required to implement mitigation or pay mitigation fees pursuant to Rule 9510.

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[117] *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.
[118] *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722.
[119] *Berkeley Jets*, 91 Cal.App.4th at 1355.
[120] Addendum, Appendix A, Revised MND, p. 68.
[121] Addendum, Appendix A, p. 77.
[122] Rule 9510, available at https://www.valleyair.org/rules/currntrules/r9510.pdf.

3. *Biological Resources.*

As discussed above, revised Mitigation Measures PDF-BIO 1 proposes to conduct a future study of Swainson's hawk at the Project site to determine whether, and to what extent, compensatory mitigation should be required to mitigate the loss of foraging habitat.[123] The County's approach is improper because, not only does Measures PDF-BIO 1 defer the selection of mitigation measures, it defers the initial baseline analysis of impacts to Swainson's hawk that the County was required to include in its CEQA document in the first place.

4. *Decommissioning.*

The Addendum fails to analyze the decommissioning phase of the Project, and instead disguises a requirement to develop a decommissioning plan for waste disposal as part of the Project's deferred AMP.

CEQA mandates that lead agencies must include in a project description the "whole of an action" which is being approved, including *all* components and future activities that are reasonably anticipated to become part of the project.[124] This includes, but is not limited to, "later phases of the project, and any secondary, support, or off-site features necessary for its implementation."[125] The requirements of CEQA cannot be avoided by chopping a large project into many little ones or by excluding reasonably foreseeable future activities that may become part of the project.[126]

The Project would be operational for at least 30 years and has three distinct phases: construction, operation, and decommissioning.[127] However, the Addendum fails to make even a reasonable attempt to describe Project decommissioning activities in any detail. The Addendum contains a single paragraph discussing the decommissioning phase.[128] As a condition of retaining the FSZ designation for the Project site, the Applicant will be required to decommission the Project and reclaim Project soils to pre-Project agricultural production levels.[129] Decommissioning of the

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[123] Staff Report, Exhibit B, MMRP, p. 6.
[124] 14 CCR §15378 (emphasis added).
[125] *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.
[126] Pub. Resources Code § 21159.27 (prohibiting piecemealing); see also, *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370.
[127] Addendum, pp. 10-11.
[128] Addendum, p. 11.
[129] Staff Report, p. 16.

Project at the end of its useful life is therefore a reasonable certainty, and a phase of the Project that should have been analyzed in detail in a CEQA document.

Evidence in the Addendum suggests that decommissioning will have impacts similar to the construction phase of the Project, and will entail removal and disposal of both ground-level and underground components, thus involving soil disturbing activities.[130] Since Project construction will entail the use of diesel-emitting construction equipment and numerous haul truck trips to transport equipment and facility components to the Project site, clearly decommissioning (or deconstruction) of the Project will require similar equipment to remove those items from the Project site. There can be no reasonable question that, if construction activities will result in significant impacts to air quality and biological resources, then surely decommissioning activities will as well.[131] Nevertheless, the Addendum makes no attempt to quantify the number or types of construction equipment and haul trucks that will be required to remove the solar equipment from the Project site. Nor does the Addendum contain any mitigation measures or pre-construction survey requirements to address biological impacts that will occur during the decommissioning phase.

As a result, the Addendum fails to describe the full scope of the Project being approved, and fails to disclose the full range and severity of the Project's significant environmental impacts from decommissioning. This is a project-level CEQA document, not a program-level EIR. The County, as the lead agency, must analyze the whole of the Project in a single environmental review document and may not piecemeal or split the project into pieces for purposes of analysis. The steps and environmental impacts of the refurbishing and ultimate decommissioning phases of the Project must be described and analyzed in an EIR with the fullest degree of detail available in order to provide the public with sufficient information to permit "an intelligent evaluation of the potential environmental effects of [the] proposed activity."[132]

A new CEQA document must be prepared and circulated for public comment to remedy these grave deficiencies in the County's impacts analysis.

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[130] Addendum, p. 11.

[131] Recognizing the magnitude of potentially significant impacts from decommissioning a renewable energy project, other lead agencies, such as the California Energy Commission ("CEC"), regularly require extensive analyses of decommissioning in their EIRs for renewable energy projects. See Exhibit F.

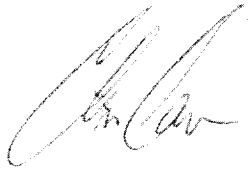
[132] *San Joaquin Raptor*, 27 Cal. App. 4th at 730.

IV. CONCLUSION

For the reasons set forth above, the County may not approve an extension of CUP 10-05 for the new / modified Project until it prepares a legally adequate CEQA document that fully analyzes the Project's potentially significant impacts, and identifies and incorporates all feasible mitigation measures to minimize these impacts.

We urge the Planning Commission to deny the CUP extension, recommend that the previously approved CUP be set aside, and direct that a subsequent CEQA analysis be prepared for the revised Project. Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Christina M. Caro

CMC:ric

Attachments